In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 502

IRA CHASE KOEHNE AND JOHN A. SAVAGE,
PETITIONERS

v.

W. BRUCE MATTHEWS, UNITED STATES MARSHAL, AND CURTIS REID, RESIDENT SUPERINTENDENT, DISTRICT OF COLUMBIA JAIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On December 11, 1946, three informations were filed against petitioner Savage in the Municipal Court for the District of Columbia. The first charged him with using certain premises for a purpose other than a single family dwelling without having obtained a "certificate of occupancy."[1]

[1] D. C. Code (1940), § 5-413, as amended, provides in pertinent part:

"To promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia

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The second and third charged him with operating the same premises as a rooming house without a license from June 14, 1946, to October 31, 1946, and from November 1, 1946, to December 11, 1946, respectively.[2] On April 12, 1947, after a trial before the court, Savage was convicted on all three informations and he was sentenced to a fine of $10 or 10 days in jail in default of payment in the occupancy permit case,[3] and in each of the two license cases he was sentenced to a fine of $100 or

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* * * the Zoning Commissioner * * * is hereby empowered * * * to regulate * * * the uses of buildings * * * for trade, industry, residence, recreation, public activities, or other purposes; * * *."

Section XX of the Zoning Regulations, issued pursuant to this statute, prohibits the use of any building for any purpose other than a single-family dwelling without the issuance of a "certificate of occupancy" by the Inspector of Buildings.

[2] The District of Columbia Code provides that no person shall engage in any business for which a license fee is imposed without first having obtained a license. D. C. Code (1940), § 47–2301. It is further provided that the Commissioners of the District of Columbia may in their discretion require licenses for other businesses in addition to those specifically enumerated in the Code. D. C. Code (1940), § 47–2344. By regulations issued pursuant to this act, the Commissioners have required the operators of rooming houses to obtain licenses after having complied with certain health requirements.

[3] The District of Columbia Code provides that the penalty for such a violation shall be "a fine of not more than $100 per day for each and every day such violation shall continue." D. C. Code (1940), § 5–422. Where the Municipal Court imposes a fine it may commit the defendant to jail in default of payment for a period not exceeding one year. D. C. Code (1940), § 11–606.

30 days in jail [4] in default of payment. The sentences were ordered to run consecutively.

Savage appealed to the Municipal Court of Appeals for the District of Columbia, contending that the licensing statute and regulations were unconstitutional, that no proper notice was given why his applications for an occupancy certificate and a license were refused, that he was entitled to a jury trial, that he had been subjected to double jeopardy, that he was brought to trial upon one of the three informations without proper notice, that the court refused to permit him to make a statement prior to sentence, and that he was denied the right to reopen the case to offer further evidence to refute testimony which had surprised him. The Municipal Court of Appeals discussed these contentions in a long and careful opinion and affirmed the judgment of the trial court on July 18, 1947. *Savage* v. *District of Columbia*, 54 A. 2d 562–570. A rehearing was denied on September 3, 1947.[5] Thereafter, the United States Court of Appeals for the District of Columbia Circuit denied a petition for allowance of an appeal to that court (R. 7).

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[4] The penalty provided in cases of this nature is a fine of not more than $300 or imprisonment for not more than 90 days. D. C. Code (1940), § 47–2347.

[5] Since the record of the proceedings up to this point has not been included in the record filed in this Court, we have relied upon the opinion of the Municipal Court of Appeals for the above-stated facts. Petitioners, while attacking the legal conclusions of the opinion, do not challenge the accuracy of its factual statements.

Apparently Savage then refused to pay the fines and went to jail. The present proceeding was begun on January 20, 1948, by the filing of a petition for a writ of habeas corpus in the District Court for the District of Columbia, in which the United States Marshal and the Superintendent of the District jail were named as respondents.* For the most part the grounds urged for relief were those already passed upon by the Municipal Court of Appeals (R. 1–4). In addition, it was alleged that Savage had been given only one day to obtain counsel, thus being deprived of the effective assistance of counsel, and that the informations were invalid because the District of Columbia was not named as accuser (R. 2–3, 4; cf. R. 14–16). Issuance of the writ was denied, without a hearing and apparently without answer by the Government, on the same day the petition was filed (R. 5). This order was affirmed in a *per curiam* opinion by the Court of Appeals for the District of Columbia Circuit on July 19, 1948 (R. 7–8; 169 F. 2d 889), and a petition for a rehearing was denied on September 27, 1948 (R.

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*The petition was filed by petitioner Koehne *ex relatione* Savage. The Government's brief in the court below states that Savage has served ten days of his sixty-five day sentence and that the balance of his partially commuted fine is now approximately $177. We have been informed by the Clerk of the Court of Appeals for the District of Columbia Circuit that Savage was admitted to bail by that court pending appeal in the present habeas corpus proceeding and that the order is still in effect.

24). On December 23, 1948, the time for filing a petition for certiorari was extended by order of the Chief Justice to January 7, 1949 (R. 28), on which day the petition was filed.

It is contended that the habeas corpus petition stated facts which, if true, entitled Savage to release, and that the district court erred in denying the Petition without a hearing (Pet. 4–5, 8, 9). However, examination of the petition reveals that some of the alleged grounds for relief were mere conclusions of law, unsupported by allegations of fact. All the other contentions made in the petition involved alleged errors in the proceedings in the municipal court which were correctible by appeal to the Municipal Court of Appeals, by petition for allowance of appeal to the United States Court of Appeals, and by petition for a writ of certiorari in this Court. The fact that there had been an appeal was not mentioned in the petition. Nor was there anything to indicate to the district court that this avenue of relief was unavailable to Savage, or that he had tried it and failed to obtain relief, or that there were any exceptional circumstances in his case which would justify resort to the extraordinary remedy of habeas corpus. Consequently, the district court was justified in concluding from the face of the petition that it was simply an attempt to make the writ of habeas corpus do service for an appeal. *Sunal* v. *Lage*, 332 U. S. 174; *United States ex rel. Mc-*

Cann v. *Adams,* 320 U. S. 220. The petition failed to state facts requiring the issuance of the writ and it was properly denied without a hearing.

Furthermore, a comparison of the allegations of the habeas corpus petition with the opinions of the courts below fails to reveal any error in the trial proceedings. Most of the contentions of the habeas corpus petition are fully disposed of in the painstaking opinion of the Municipal Court of Appeals and we think it unnecessary to do more than to refer to that opinion here.[7] *Savage* v. *District of Columbia,* 54 A. 2d 562. So far as concerns the two contentions not raised in the Municipal Court of Appeals, it is obviously frivolous to argue that, because the informant was a Corporation Counsel, the prosecution was not brought in the name of the District of Columbia. See D. C. Code (1940), § 11–616. And the court

[7] The attack on the constitutionality of the statutes under which Savage was convicted seems to have taken a different aspect. In the Municipal Court of Appeals it was argued that the regulations in question were unreasonable and that power to adopt such regulations could not be delegated to the District Commissioners. 54 A. 2d at 564–566. Now it is contended that the regulations were unconstitutional as applied to any building which had been lawfully erected prior to their adoption (Pet. 3–4, 9–10). The contention is clearly without merit. The District of Columbia Code does specifically exempt all nonconforming uses of buildings which antedate the adoption of a regulation. But there is no contention that Savage's use antedated the regulations. And there can be no doubt that the regulations would apply to a use of a prior constructed building begun subsequent to their adoption.

below, which had the record of the municipal court proceedings before it,[8] has shown (R. 7–8; 169 F. 2d 889) that there is no basis for the contention that Savage was denied the right to have assistance of counsel.

Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1949.

[8] The record of the municipal court proceedings was already before the United States Court of Appeals as the result of the petition for allowance of appeal to the court from the Municipal Court of Appeals. The United States Court of Appeals had the right to consult the record of the prior proceedings contained in its own files when it considered the appeal in the habeas corpus proceeding. *Craemer v. Washington State*, 168 U. S. 124, 129; *Andersen v. Treat*, 172 U. S. 24, 29.

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